

Ann E. Clark, Legal Counsel
Special Assistant Attorney General
Montana State Fund
P.O. Box 4759
Helena, Montana 59604-4759
Telephone: (406) 444-6480
Attorney for Respondent

FILED
FEB 20 2001
OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

<p>ROBERT FLYNN, Petitioner, vs. MONTANA STATE FUND, Respondent/Insurer, SALISH KOOTENAI COLLEGE, Employer.</p>	<p>WCC No. 2000-0222 Claim No. 3-93-20753-5 Respondent's Reply Brief</p>
---	---

COMES NOW Respondent Montana State Fund (hereinafter State Fund), by and through counsel of record, Ann E. Clark, and hereby submits this Response to Petitioner's Opening Brief. The Parties have agreed to submit this matter for decision based upon the Agreed Statement of Facts.

Argument I

The State Fund is not required to bear a pro rata share of costs and attorney's fees incurred by Petitioner, Robert Flynn (hereinafter Petitioner) as a result of retaining counsel to represent him in respect to his social security claim. There are no provisions in the Workers' Compensation Act, which provide for an award of attorney's fees and costs incurred in obtaining benefits under the Social Security Act.

Benefits payable from the social security administration by reason of disability are subject to offset for a Workers' Compensation claimant who is entitled to temporary total disability or permanent total disability benefits under Sections 39-71-701,702, MCA, (1991).

Neither Sections 39-71-701, MCA nor 39-71-702, MCA provide for a pro-rata share of attorney fees to be shared by an insurer and a Petitioner. These sections clearly state:

In cases where it is determined that periodic disability benefits granted by the Social Security Act are payable because of the injury, the weekly benefits payable under this section are reduced, but not below zero, by an amount equal, as nearly as practical, to one-half the federal periodic benefits for such week, which amount is said to be calculated from the date of the disability social security entitlement.

Additionally, see 20 C.F.R. §404.408 (2000), in particular, page 142 (c):

Amount of reduction – (1) General. The total of benefits payable for a month under sections 223 and 202 of the Act to which paragraph (a) of this section applies is reduced monthly (but not below zero) by the amount by which the sum of the monthly disability insurance benefits payable on the disabled individual's earnings record and the other public disability benefits payable for that month exceeds the higher of:... (remainder of section purposely omitted).

In Belton v. Transp. Indem. Co., 220 Mont. 194, 714 P2d 148, (1986), it was decided that Montana law allows an offset against compensation when an injured worker is also receiving social security disability benefits.

This issue was also addressed by the Montana Supreme Court in Stahl v. Ramsey Construction Co., 248 Mont. 271, 811 P.2d 546 (1991) at 274. The question submitted was:

Is State Fund entitled to offset a portion of Mr. Stahl's retroactive social security disability benefits which are paid to his attorney as an authorized attorney's fee for legal services rendered in obtaining those benefits?

In responding to this question the Montana Supreme Court Id. at 274:

We hold that under Section 39-71-701(2) MCA, the State Fund is entitled to offset a portion of Mr. Stahl's retroactive social security benefits which are paid to his attorney as an authorized attorney's fee for legal services rendered in obtaining those benefits.

In issue III, Id. at 274 the Supreme Court addressed the additional question of: "Should State Fund be required to bear an equal share of costs and attorney's fees incurred by Mr. Stahl to establish his social security claim?" The Court found this "This issue in an alternative argument to issue II. Absent statutory or contractual authority to support Mr. Stahl' claim, this issue fails for the same reasons discussed under issue II. "

In this case, Petitioner asserts that the State Fund “should bear one-half of these fees since it received one-half the benefits.” This assertion leads to an absurd result. An insurer has no right to assert a claim for social security benefits on behalf of an injured worker, and has no control over the time of the request, the evidence presented, the selection of an attorney to represent the worker or the amount or quality of work the attorney performs.

If the efforts to receive social security benefits were dependant on the work of both an insurer and the petitioner’s counsel, there may be some contractual basis for Petitioner’s argument. However, as found in Stahl, the Montana Supreme Court stated:

Mr. Stahl also asserts that by allowing State Fund to offset the portion of the retroactive social security disability benefits that were paid directly to the attorney, it unfairly placed on him the entire burden of attorney’s fees and costs for the social security claim because State fund as also benefited by the right to an offset. ... In the absence of statutory or contractual authority for the claimant’s position, we conclude there is no basis to deny the State Fund’s right to offset that portion of the social security benefits that are paid to the attorney. Id. at 274

Additionally, the Petitioner asserts that Murer v. State Compensation Ins. Fund, 283 Mont. 210, 942 P.2d 69 (1997), supports that when a party, through active litigation creates a common fund which directly benefits another, the non-participating beneficiary can be required to bear a portion of the litigation costs. No common fund has been established in the case at hand, there is no class of beneficiaries. Murer, does not supersede or effectively overrule Stahl, Id.; the cases deal with different principles of law and are not related.

Argument II

The Petitioner mistakenly contends that Mackney v. State Fund, Mont. WCC No. 9211-6622, (June 18 1993) applies in this case, and that the State Fund was required to negotiate when and how much of an offset, recoupment, or reduction it may take. Mackney, Id. involved a dispute regarding a representation to the claimant that an offset would not be taken and in so doing was barred by the principle equitable estoppel to recoup the social security offset. In this case Petitioner was notified each time an offset or recoupment was initiated. State Fund has not misled the Petitioner regarding its intention to offset or recoup the social security benefits; hence no such estoppel exists. Mackney does not apply to this case.

Argument III

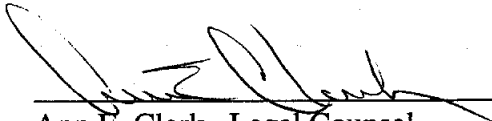
Petitioner’s request that the State Fund be required to pay a penalty, attorney fees and costs for terminating and refusing to pay certain total disability benefits is without merit and without support. Again the Petitioner cites Mackney. For the reasons discussed earlier Mackney should not be applied in this case. Mackney does not state that an insurer has a duty to negotiate with the Petitioner nor does it state that the insurer must file a petition in court to settle an offset

or recoupment issue. The State Fund was authorized under 39-71-701(5), 39-71-702(4) MCA (1991) to offset the Petitioner's benefit payment.

The assertions the Petitioner has made in this case have long been resolved by this Court and the Montana Supreme Court. There have been no changes in the law to support Petitioner's assertions. As such, his requests should be denied.

DATED this 20th day of February, 01.

MONTANA STATE FUND



Ann E. Clark, Legal Counsel
Special Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing on the following party:

Rex Palmer, Esq.
Attorneys Inc., P.C.
301 West Spruce
Missoula, MT 59802

by depositing the same in the United States mail, postage prepaid, on this 20th day of February, 01.


Amanda J. Krissovich
Paralegal